

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-2067

SEP 30 1977

In the
UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 77 - 2067

MICHAEL H. BROWN
Appellant

UNITED STATES OF AMERICA
Appellee

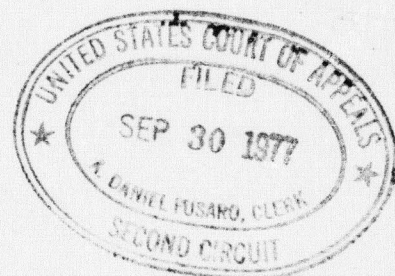
On Appeal from the United States District Court for the Southern
District of New York

BRIEF FOR APPELLANT

+
Appendix

Michael H. Brown
Reg. No. 81856 - 158
P.O. Box 33
Terre Haute, Indiana 47808
Appellant Pro Se

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* PLEASE RETURN TO *
* RECORDS ROOM *
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CITATIONS

Bowers v Coiner 309 F Supp 1064
Stack v Boyle 342 U.S. 1
Williams v United States 463 F 2d 1183
Moore v Michigan 355 U.S. 155
Von Moltke v Gillier 332 U.S. 708
Kaufman v United States 394 U.S. 217
Townsend v Sain 372 U.S. 293
Hill v United States 368 U.S. 424
Davis v United States 417 U.S. 333
United States v Consiglio 391 F Supp 564
Procunier v Martinez 416 U.S. 396
Faretta v California 422 U.S. 806
Strauss v United States 516 F 2d 980
United States v Travers 514 F 2d 1171
Gates v United States 515 F 2d 73
Brough v United States 454 F 2d 370
United States v Plattner 330 F 2d 271
Stepp v Estelle 524 F 2d 447
In Re Oliver 333 U.S. 257
United States v Hayman 342 U.S. 205
Kahane v United States 396 F Supp 687

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I and II, page 2 III, page 3 IV and V, page 4 VI and VII, page
5 VIII, IX, and X.

I

"No defect in the indictment remains" may be true but the fact still remains the appellant was denied a fair trial since Count Two colored the rest of the proceedings with confusion (trial transcript p. 313) since even a lawyer's wife did not know what the defendant was being tried for. It appears to be quite proper to close the barn door after the (Constitutional) horse is let out. The appellant reiterates his original memorandum in support of petition.

II

The District Court chose to ignore the evidence (Exhibit C) in the original memorandum, failed to hold an evidentiary hearing that the appellant believes he was entitled to, allowed the government to submit perjurious affidavits (see affidavits attached from Claudia B. Smith and Jerald Walraven), misconstrued the law on a "deliberate bypass" on appeal, and completely ignored the appellant's legitimate complaints.

The only case cited used by the District Court were Bowers v Coiner 309 F. Supp. 1064 which evidently over-rules Stack v Boyle 342 U.S. 1,4 (1951) in the Second Circuit on eighth amendment claims (see original memorandum); would that the Federal government were as fair as the State of California in which a certain bail is set for each crime instead of the usual arbitrary system.

William v United States 463 F 2d 1183 has no precedential value in the instant case. The accused can hardly be expected to know in advance what a corrupt prosecution is doing and since he was "muzzled"

by the Court he could hardly be expected to jump and holler "objection" while his attorney is halfway across the room, the post trial record clearly shows that the fault of the appellant to raise a fourth amendment issue on appeal was the fault of the Appeals Court in arbitrarily denying the appellant an extension of time to properly confer with his appeal counsel (see Motion filed by the appellant's counsel MICHAEL YOUNG Nov. 11, 1975), the language itself of 28 U.S.C. §2255 quite clearly contradicts the position of the District Court, Federal courts should refrain from casually finding waiver of vital constitutional guarantees, Moore v Michigan 355 U.S. 155, there must be affirmative judicial involvement in the waiver process, Von Moltke v Gillier 332 U.S. 708, 723-4, the right to litigate or relitigate such an issue via § 2255 is an absolute one, Kaufman v United States 394 U.S. 217, Townsend v Sain 372 U.S. 293, Hill v United States 368 U.S. 424, Davis v United States 417 U.S. 333, and United States v Consiglio 391 F. Supp. 564, 569.

Mail tampering is illegal when done against convicted prisoners, Procurier v Martinez 416 U.S. 396, how much more so those who have the "presumption of innocence" guaranteed by the Constitution?

III

The District Court simply evaded the issue on jury selection. Two of the cases cited are simply not controlling in the Second Circuit (at least not until this appeal is decided) and the Supreme Court case cited has nothing whatsoever to do with jury selection.

If it is perfectly acceptable to exclude 25% of the eligible voting population from jury service for euphemistic reasons the Court, this or any other, should have the integrity to say so in order that Congress or the Supreme Court might remedy the situation.

IV

The appellant reiterates his original position. The arrogance and intransigence of the legal profession is much more well known to prisoners than it is to the judiciary. To use a crude analogy, the judges may have degrees in zoology but we live in the swamp.

V

The District Court's position that under traditional legal doctrine Faretta v California 422 U.S. 806 is not retroactive is incorrect. Supreme Court decisions must be applied retroactively, Strauss v United States 516 F 2d 980; United States v Travers 514 F 2d 1171 (Second Circuit 1974), a statute does not mean one thing prior to the Supreme Court's interpretation and something entirely different afterwards, Gates v United States 515 F 2d 73 at 78, and Brough v United States 454 F 2d 370.

The trial judge must instruct the defendant seeking to act pro se that he has the choice between defense by a lawyer and defense pro se, United States v Plattner 330 F 2d 271, 276 (Second Circuit 1964). The appellant had no such option; for a good faith effort underscoring Plattner see Stepp v Estelle 524 F 2d 447, 450. To a layman the assistance spoken of in the Sixth Amendment means "help",

to the courts it appears to mean "choice" until the Supreme Court clarifies Farretta:

The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.

And let the appellant remind the Court that it is he, not his lazy attorney, who has already done three (3) years in a bloody, stinking, dangerous, and demoralizing pigsty that can at its most charitable be described as a School for Gladiators.

VI

If there is no constitutional right to an opinion on appellate review there should be; for the reasons already given and that without publicity all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance, In Re Oliver 333 U.S. 257, 271.

VII

"...petitioner cites no authority which persuades this Court..." seems to mean that whatever this petitioner cites is simply going to be thrown out the window; whether it is a Supreme Court case or anything else that might grant the appellant relief. The elements of the last count added were different and just because such prosecutorial jockeying to gain added advantage over the defendant is practiced by

Second Circuit prosecutors is common that does not make it legal --- or even fair.

VIII

The rulings in Billiteri relied on by the Court below are plainly contradicted by United States v Hayman 342 U.S. 205 (1952) in which the Supreme Court held that any claim cognizable under 28 U.S.C. § 2241 must also be cognizable under 2255. Hayman was quoted quite extensively in Kahane v United States 396 F Supp 687 (Second Circuit). Or is there one Constitution for Jews and quite another for non-Jews?

IX

Judging from the number of cases quoted by the Government in the Court below either a lot of prisoners are submitting weak issues or a lot of government agents are professional liars. Again, had the jury known the Staffords were to receive probation there testimony would have carried much less weight.

Had the defendant's attorney moved for a Quincy hearing in advance of trial thereby shortstopping the perjurious testimony of agent Glass (I heard Brown mutter "You can't do anything against the Commies in New York") much of this would have been unnecessary.

X

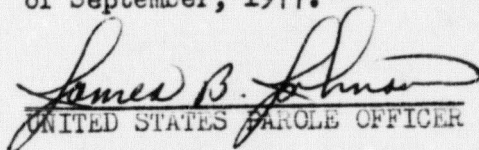
Refer to paragraph (2) in (IX); the appellant is well aware of the standards of the Second Circuit and had he been in D.C. he would have had the advantage of a DeCoster case in which the Court ruled

that an attorney must make a good faith effort at a defense and do the normal things an attorney is supposed to do (which the appellant's didn't).

CONCLUSION

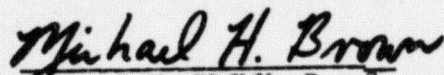
For any or all of the reasons set forth the appellant has alleged a prima facie denial of his Constitutional rights. The District Court accordingly erred in denying the motion to vacate sentence. The order of the District Court should therefore be reversed.

Subscribed and Sworn to
before me this 8th day
of September, 1977.


UNITED STATES MARSHAL OFFICER

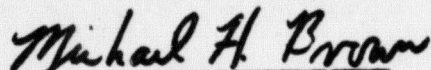
Authorized by the Act of July 7, 1955
to administer oaths (18 U.S.C. 4004)

Respectfully Submitted,


MICHAEL H. BROWN Pro Se
Reg. No. 81856-158
P.O. Box 33
Terre Haute, Indiana 47808

CERTIFICATE OF SERVICE

Two copies of the foregoing motion were mailed 8 September to the United States Attorney, U.S. Courthouse, Foley Square, New York, N.Y. 10007.


MICHAEL H. BROWN

A F F A D A V I T

I, the undersigned, do hereby certify that:

1. My name is Jerald Walraven.
2. My residence is 1207 Pioneer, Dallas, Texas.
3. That I was interviewed by agents of the F.B.I. at the above address on or about October 9, 1974.
4. That said interview concerned criminal charges against Michael H. Brown.
5. That during said interview agents of the F.B.I. appeared to be familiar with the contents of a letter sent to the undersigned by Michael H. Brown from the Detention Center in Lexington, Kentucky before that letter and only that letter was turned over (under duress) to the F.B.I. agents conducting the interview.

AFFIANT SAITH NAUGHT

Notary Public *Barbara Lavender*
My Commission Expires *6-1-77*

Collin County, Texas

DATE: *10th day of February, 1977*

Jerald T. Walraven
JERALD WALRAVEN
1207 Pioneer
Dallas, Texas

TO WHOM IT MAY CONCERN:

I, the undersigned, do hereby depose and state that:

(1) I am a long time friend and acquaintance of Michael H. Brown, Reg. No. 81856, P.O. Box 33, Terre Haute, Indiana, formerly of 101 Cherry Road, Berea, Kentucky, 40403.

(2) That Michael H. Brown corresponded with my family while he was incarcerated in Lexington, Kentucky, during or about the month of September, 1974.

(3) That the mail we received from Michael H. Brown, before we received it, had been opened and scotch-taped back together.

(4) That we understood such opening of mail by prison personnel was standard procedure.

Notary Public
MY COMMISSION EXPIRES:

Dwight A. Brown Jr.
April 3, 1981

Respectfully Submitted,

Claudia B. Smith

Claudia B. Smith

P.O. Box 802
Ellsworth, Maine 04605

ENDORSEMENT ORDER

By the attached papers, petitioner Brown seeks an order vacating his conviction, pursuant to 28 U.S.C. §2255. Having reviewed the petition, the Court determines that seven of the ten claims raised herein should be summarily denied, and as to the remainder, the government should be directed to respond. Petitioner has itemized ten claims, and the Court will retain the same designations.

I. Petitioner can suffer no prejudice from the legal inadequacy of Count Two. The judgment of conviction as to Count Two was reversed and the charge dismissed. No defect in the indictment remains. Denied.

II. The government is directed to respond to this claim that petitioner's mail was opened and his letters used against him.

III. The government is directed to respond to this claim that the jury selection plan is unconstitutional because it excludes transients and felons.

IV. As to petitioner's claim that he was denied compulsory process, it is clear that he was afforded such a right. The specific claim here is that his attorneys failed to call certain witnesses or retain an investigator. This does not constitute a denial of compulsory process. Whether this constitutes inadequate assistance of counsel is addressed infra. Denied.

V. Contrary to the assertion, petitioner was not excluded from the proceedings: Brown was present at all times during the trial before the undersigned and a jury. The Court at that time properly refused to entertain pro se motions from the petitioner since he was represented by counsel. To the extent that petitioner's other claims rely upon Faretta v. California, 422 U.S. 806 (1975), the Court notes that Faretta was decided well after the trial herein, and under traditional legal doctrine the Faretta decision is not retroactive. Denied.

VI. There is no constitutional right to a full-blown opinion upon appellate review. Denied.

VII. The addition of Count Four on the day of trial through the filing of a superseding indictment was not, under the circumstances presented, a denial of the right to fair notice and time to prepare a defense. While Count Four charged a new crime--interstate transportation of explosives--the charge derived from the same factual circumstances as did the previous counts. Indictments are commonly superseded on the day of trial, and petitioner cites no authority which persuades this Court that what occurred herein was a denial of fair notice or due process. Denied.

VIII. The claims concerning the failure of the Bureau of Prisons to comply with their own policy guidelines are dismissed. See Billiteri v. United States Board of Parole, No. 75-6120 (2d Cir. August 30, 1976).

IX. The government is directed to respond to the petitioner's claim of perjured testimony.

X. This claim alleges inadequate assistance of counsel. Brown alleges that one of this two court-appointed lawyers failed to appear at trial. However, there is no right to two lawyers. Against trial counsel Hanes, petitioner alleges only that Hanes did not represent petitioner on appeal. However, petitioner was represented on appeal by Michael Young of the Legal Aid Society, a highly competent attorney who secured the reversal of the conviction on one count. Nor does petitioner have the right to select his court-appointed attorney on appeal; that responsibility lies with the Circuit Court or the trial court. Finally, a failure to "pursue" pre-trial motions does not rise to the level of inadequate assistance. Even assuming for the purposes of this motion that all the allegations are true, petitioner has not demonstrated that his trial was a farce or a mockery of justice such as would shock the Court's conscience. Thus, under the applicable principles, the claims must be denied. See United States v. Yanishefsky, 500 F.2d 1327 (2d Cir. 1974). Denied.

Decision is reserved on petitioner's application to vacate the judgment of conviction and for an opportunity to amend this petition. The Court presumes that the United States Attorney is aware of his responsibilities in this case as set forth in Formal Opinion 280 of the A.B.A., which requires an attorney to advise the Court of decisions adverse to his position which his opponent has not raised--and that he will comply therewith. Thus, the application for an order directing compliance is denied.

v. 4980 (cont.)

Petitioner's request for a photocopy of all authorities published prior to 1972 which will be cited by the government in its reply papers is hereby granted. The government is directed to append to the petitioner's copy of its anticipated memorandum in opposition a photocopy of any decision cited which was published prior to 1972.

The government is directed to file papers in opposition to items II, III, and IX of the petition within thirty days hereof.

SO ORDERED.

Dated: New York, New York
December 13, 1976

LAWRENCE W. PIERCE
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
MICHAEL HALSEY BROWN,

Petitioner, :

- v - :

76 Civ. 4980
(Pro Se)

UNITED STATES OF AMERICA,

Respondent. :
-----x

ORDER

This is a petition brought pursuant to 28 U.S.C. §2255. On December 13, 1976, this Court dismissed seven of the ten claims contained in the petition, and directed the government to respond to the three claims remaining. The government filed its opposition papers on January 14, 1977, and petitioner Brown filed his reply on March 8, 1977. The Court's rulings on the three claims are as follows:

Alleged Use of Mail at Trial

Brown claims that during his pre-trial incarceration, agents of the government opened his mail and thereby uncovered evidence which was subsequently used against him at trial. Brown claims that this violated his eighth amendment rights.^{1/}

^{1/} Petitioner Brown was held on \$100,000 bail following his arrest and that bail was never reduced. Such bail was clearly not excessive in light of the charges against the petitioner. See Bowers v. Coiner, 309 F.Supp. 1064 (S.D. W.Va. 1970). In any event, the Court does not find that the amount of bail set prior to trial, regardless of its amount, could have any effect upon the validity of the judgment of conviction in this case. Accordingly, with respect to the eighth amendment argument, the Court "can

The government suggests that Brown is actually seeking to raise a fourth amendment claim concerning the opening of his mail. Petitioner's reply papers appear to support this contention. However, the affidavit of the prosecutor establishes that no letters were ever employed at the trial of this action; further, it would appear that Brown was aware of this alleged search and seizure and that he chose not to raise the issue at trial or on his direct appeal. Thus, there has been a "deliberate bypass" and petitioner is now foreclosed from asserting the search and seizure claim. See William v. United States, 463 F.2d 1183 (2d Cir.), cert. denied, 409 U.S. 967 (1972).

The government further asserts that Brown is foreclosed from raising this claim by the recent decision of the Supreme Court in Stone v. Powell, 44 U.S.L.W. 5313 (U.S. July 6, 1976). However, in light of the ongoing discussion concerning the reach of that decision, see Gates v. Henderson, No. 76-2065 (2d Cir. Jan. 12, 1977), the Court declines to reach the question of whether the rule of Stone v. Powell should be extended to include habeas corpus claims made by federal as well as by state prisoners.

1/ (continued)

find no basis in fact or law" for the claim. Bowers v. Coiner, supra, 309 F.Supp. at 1074.

Brown asserts that he did not have an adequate opportunity to raise the search and seizure issue at trial or on appeal; in support of this claim, he alleges simply that his lawyers did not know about the search. However, counsel cannot be expected to read the petitioner's mind; the failure to raise the issue was petitioner's, not that of his counsel. Accordingly, the Court concludes that the fourth amendment issue has been waived and that the claim must accordingly be dismissed. Williams v. United States, supra.

Jury Selection

Brown claims that his conviction must be vacated since the Jury Selection Plan for the Southern District of New York excludes transients and felons from service upon grand and petit juries. The argument is without merit. Bolling v. Sharpe, 347 U.S. 497, 499 (1954); United States v. Owen, 492 F.2d 1100, 1109 (5th Cir. 1974); United States v. Arnett, 342 F.Supp. 1255, 1261 (D. Mass. 1970) (Wyzanski, J.). Thus, the jury selection claim must be dismissed.

Claim of Perjured Testimony

Brown claims that four government witnesses lied on the stand in his case. First, he claims that two persons, Larry and William Stafford, lied when they stated that they had been made no promises in exchange for their testimony.

At the time of the trial, the Stafford brothers were charged with criminal offenses for which they subsequently pleaded guilty. Brown claims that their testimony gave the jury the impression that they would be going to jail, while they in fact thereafter received sentences of probation. The mere allegations of the petition do not, on their face, constitute a claim of perjury. The bare fact that the Staffords received probationary terms does not establish that any promises existed or that the Staffords knew, at the time they testified, that probation would be the outcome. Nor does Brown allege that the prosecutor knew that the testimony was perjurious, if indeed it was. See Hallman v. United States, 490 F.2d 1088 (8th Cir. 1973); see also United States v. Stofsky, 527 F.2d 237, 245-47 (2d Cir. 1975).

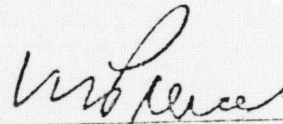
The same infirmities are present in Brown's claim that two government agents committed perjury. Brown claims that the agents lied when they attributed to Brown certain statements concerning communists in New York, and concerning certain ingredients for explosives. The barefaced denial of these statements by the petitioner is not a sufficient factual showing to establish that the agent's statements were indeed perjurious. Further, there is no allegation that the prosecutor was aware of the alleged perjury, if indeed any existed. See Romano v. United States, 460 F.2d 1198 (2d Cir. 1972) (per curiam); United States v. Gonzales, 33 F.R.D.

280 (S.D.N.Y. 1960), aff'd, 321 F.2d 638 (2d Cir. 1963).

For the foregoing reasons, the petition for a writ of habeas corpus is hereby denied in all respects.

SO ORDERED.

Dated: New York, New York
April 22, 1977



LAWRENCE W. PIERCE
U. S. D. J.